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No. 90-857

In The

Supreme Court of the United States

October Term, 1990

MARC GILBERT DOGGETT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are:

(1) Where taken together, three of the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), weigh in favor of the accused, should an additional mandatory requirement of actual prejudice be imposed in order for the accused to prevail on a claim that his right to a speedy trial has been violated; and

(2) Has *Moore v. Arizona*, 414 U.S. 25 (1975), which holds that an affirmative demonstration of prejudice is not required, been reversed?

LIST OF PARTIES

The petitioner is Marc Gilbert Doggett. The respondent is the United States of America.

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OPINIONS BELOW

The opinion of the court of appeals [Pet.App. 64-105] is reported at 906 F.2d 573. The opinion of the district court [Pet.App. 62-63] is not reported.

JURISDICTION

The judgment of the court of appeals [Pet.App. 64-105] was entered on July 19, 1990. A petition for

rehearing with a suggestion for rehearing *en banc* was denied on September 12, 1990 [Pet.App. 106-108]. A petition for writ of certiorari was filed on November 30, 1990 and was granted on February 25, 1991 [J.A. 118]. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Sixth Amendment to the United States Constitution, which provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . "

STATEMENT OF THE CASE

This case arises from Marc Gilbert Doggett's conviction for one count of conspiracy to import cocaine, entered after a conditional plea of guilty pursuant to Fed.R.Crim.P. 11(a)(2). [J.A. 114, Pet.App. 65]. On February 22, 1980, Mr. Doggett was indicted in the United States District Court for the Middle District of Florida, Jacksonville Division, on charges of conspiracy to import cocaine, in violation of 21 U.S.C. § 963, and conspiracy to distribute cocaine, in violation of 21 U.S.C. § 846. [J.A. 1, 4-11, 16-17, Pet.App. 65-66]. Without knowledge of the indictment and, therefore, through no fault or evasion on the part of Mr. Doggett, he was not arrested for this offense until September 5, 1988 – over eight and one-half years after his indictment. [J.A. 73, 107-108, Pet.App. 66].

During this "presumptively prejudicial" time period [Pet.App. 77], the Government had ample opportunity to notify Doggett of the indictment against him, but failed to do so. [J.A. 24-32, 62-69]. By these proceedings, Mr. Doggett contends that the Government's delay in prosecuting him violated his constitutional right to a speedy trial.

At the time of his arrest, Mr. Doggett, was thirty-two years old, married, and gainfully employed. [J.A. 99-113; Pet.App. 50,73-74]. At the time of his indictment, he was twenty-three years old. [Pet.App. 50]. Since 1982, he has lived continuously, openly and honestly in the Reston, Virginia area under his true name while working, voting, going to school, and paying taxes. [J.A. 99-113; Pet.App. 14-15]. Mr. Doggett met his wife, Delores Doggett, in the fall of 1982, and married her in October, 1983, in Reston, Virginia, where they have resided since. [J.A. 99-101-108; Pet.App. 73]. Together, he and his wife have bought and financed two homes in their own names. [J.A. 101-111; Pet.App. 73].

Since his indictment, Mr. Doggett has never concealed his identity from the Government. [Pet.App. 73]. Since his marriage in 1982, Mr. Doggett has never been in any legal trouble, with the exception of three traffic tickets. [J.A. 109-110; Pet.App. 73]. Mr. Doggett is and has been a registered voter, has had a Virginia driver's license, has had several credit cards in his name, and has filed federal income tax returns. [J.A. 108-111; Pet.App. 73-74]. In short, there is no dispute that he has ever sought to conceal his identity to avoid detection, and

indeed no finding that Mr. Doggett ever knew that there was an indictment issued against him. [Pet.App. 66].[1]

Unbeknownst to Mr. Doggett until almost a decade later, he had on February 22, 1980, been indicted for his peripheral involvement in a cocaine importation scheme. [Pet.App. 66]. A warrant for Mr. Doggett's arrest was also issued on the day he was indicted but he was not arrested however, until September 5, 1988, some eight and a half years later. [Pet.App. 65-73]. The indictment itself was unsealed and made known to at least one of the petitioner's co-defendants on the day it was handed down. Indeed, some of Doggett's co-defendants were tried in September, 1980. [J.A. 13, 29-30].

Immediately after the court issued the arrest warrant directing the United States Marshal's Office to arrest Doggett, Agent Douglas Driver of the Drug Enforcement Agency (hereinafter DEA), the case agent for the Government, interceded and sent a memorandum to the United States Marshal's Office indicating that the DEA would "handle" the arrest. [J.A. 44, 50; Pet.App. 65-66]. The memorandum had the intended effect of relieving the Marshal's office and other governmental agencies from any responsibility for arresting the defendant. [J.A. 50]. Twenty-six days after the indictment and issuance of the arrest warrant, Agent Charles Overton of the North Carolina State Bureau of Investigation and Officer Larry

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[1] With respect to this issue the Eleventh Circuit specifically found, "It is uncontested that Doggett did not know at this or any time prior to his arrest in 1988 that he had been indicted or that a warrant for his arrest had issued." [Pet.App. 66].

Rawlins of the Wake County Beverage Control Office, while acting as part of a DEA Task Force, were instructed to go to the home of petitioner's parents in Raleigh, North Carolina to locate and arrest petitioner. [J.A. 18]. This first effort to apprehend Mr. Doggett failed.

On March 18, 1980, Agent Overton talked to defendant's mother, Leonor Pinzon Doggett, concerning her son and told her about the arrest warrant. [J.A. 18, 80]. Mrs. Doggett informed the agent that her son had left home the previous Friday, March 14, 1980, and gone to Miami to renew his passport and from there was going to fly to Colombia with his cousin. [J.A. 18-19]. Mrs. Doggett was extremely cooperative with the agents, and told them her son's departure flight number from Miami. [J.A. 18-19]. She never told petitioner of the agents' visit, nor did she tell anyone in their family. [J.A. 107-08]. No further effort was ever undertaken by the Government to locate Mr. Doggett's whereabouts through his family. [Pet.App. 13; Tr. 174,189-92].

The Government issued a teletype on March 18, 1980, to all United States Customs stations, EPIC[2] and INTERPOL,[3] stating that Marc Gilbert Doggett was wanted for his arrest as a result of his indictment. [J.A. 19-20]. The entries into these United States computer networks were cancelled six weeks later on May 2, 1980. Agent Driver

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[2] EPIC is the acronym for the El Paso Intelligence Center which "[c]oordinates intelligence gathering operations for various federal law enforcement agencies. . . ." [Pet.App. 67, n.3].

[3] INTERPOL stands for the International Criminal Police Organization which serves as an international clearinghouse for law enforcement organizations. [J.A. 96-97].

testified that he did not request the cancellations but "guessed" that the system had a standard procedure to cancel the entries after a certain number of days. [J.A. 86]. Inexplicably, Mr. Doggett's name was not entered into the National Crime Information Center computer system, the primary law enforcement computer system, until April 2, 1981. [J.A. 23-24, 46-47, Pet.App. 68]. The Government's agent Driver testified that he did not enter the name until that date because he had erroneously assumed that his prior teletype put the petitioner's name into all Government law enforcement computer networks. [J.A. 24, Pet.App. 68].

No further action of any sort was taken until September, 1981, when the Government learned that Mr. Doggett had been arrested in Panama. [J.A. 24]. Upon learning of this arrest, DEA agent Driver, contacted the DEA agent in charge of the Panama office. [J.A. 24-25]. According to Driver, he was told that his counter-part in Panama had submitted an informal written request to the Panamanian Government to release Mr. Doggett to the United States. [J.A. 27]. No written confirmation of this informal request was produced in the record below. [J.A. 30-32]. No request for extradition under the formal extradition treaty existing between the countries was ever invoked or utilized. [J.A. 57; Pet.App. 69]. The State Department was in contact with Mr. Doggett while he was incarcerated in Panama and while the DEA was supposedly trying to arrest him. Although The Panamanian offices of the State Department and DEA were then only two blocks away from one another. [J.A. 62], no attempt was made to coordinate their effort with respect to Mr. Doggett.

Nothing was done to locate or apprehend Mr. Doggett for the next three years, and the only activity reflected in the Government's file was the submission of completely erroneous reports by the DEA to the effect that Mr. Doggett remained incarcerated in Panama. [J.A. 57-63, 73, 84, 89-90; Pet.App. 70-71]. In each report, the first of which was dated January 6, 1984, the second July 18, 1984, and the third March 10, 1985, the DEA erroneously reported that Mr. Doggett was still in jail in Panama. [J.A. 33]. These reports were based solely on the DEA's "assumption" that Mr. Doggett was still in a Panamanian jail. [J.A. 57-60]. No investigation was ever conducted by the DEA to determine if this "assumption" was correct. In fact, as of even the first erroneous report, Mr. Doggett was no longer in Panama [J.A. 65-66; Pet.App. 70-71], having returned to the United States, utilizing his correct name, and residing within a close geographic distance of his parental home. [Pet.App. 73; Tr. 214].

Mr. Doggett's parents were not notified by the United States of his Panamanian incarceration. [Pet.App. 13, Tr. 174, 189-192]. His mother did however make one visit to him, and sent him money to help him survive the extreme conditions of the Panamanian jail. [Pet.App. 13; Tr. 176-177, 179-180]. Further, he was regularly visited by personnel from the U.S. State Department in Panama. [J.A. 62-64]. He was thus known and in contact with the State Department and the United States was aware post-indictment of his whereabouts. According to DEA Agent Driver, there was no prohibition against the DEA and the State Department coordinating their efforts as to Mr.

Doggett, "[a]nd it should have been done. It should have been followed up on, but apparently it wasn't." [J.A. 66]. During his incarceration, the Government never notified Mr. Doggett that he had been indicted in the United States, nor was a copy of the indictment served on him by either the DEA or the State Department.

In August 1985, DEA learned for the first time that Mr. Doggett had in fact been released from Panamanian custody in July, 1982, and this was only learned due to the coincidental transfer to Panama of DEA agent Driver. [J.A. 31-32; Pet.App. 71].[4] At this point, the agent erroneously "assumed" that Mr. Doggett knew of the indictment, had left Panama for Colombia, and was still located there. [J.A. 66]. No effort was ever undertaken to locate and arrest Mr. Doggett during or after his 1981 Panamanian arrest, and the last and only thing done thereafter to effect Mr. Doggett's arrest " . . . would have been this fugitive declaration prepared March 19, 1981, that resulted in his going – being entered into NCIC." [J.A. 73].

By 1985, the DEA in Panama no longer even maintained a file on Mr. Doggett, apparently due to the agency's policy of destroying inactive files. [J.A. 31-32]. United States Customs was not notified to watch for him if he entered the country; the only documentation that the Customs agency ever had regarding Mr. Doggett was a

[4] Ironically, Agent Driver never wrote a report indicating Mr. Doggett had been arrested in Panama until April 26, 1983, over a year after Doggett's release from Panamanian custody. [J.A. 35].

secondary search request which had been cancelled in May, 1980. [J.A. 86]. The Government's sole effort to execute the arrest warrant on petitioner from September, 1981 onward consisted of periodic checks of the Jacksonville DEA file to see if the case was still active. [J.A. 73, 89-90].

After Mr. Doggett was released from Panamanian captivity, he went to Colombia, staying briefly with an elderly aunt. [Pet.App. 70; Tr. 181-82]. On September 28, 1982, just three months after his release from the Panamanian jail, he returned to the United States using his own passport to enter at JFK Airport in New York, completely unaware of the indictment. [Pet.App. 70]. He lived for the next few months in North Carolina at his grandmother's home. [J.A. 99-100]. During that period, he met his wife and settled into the open, stable, and productive life that he has led for the ensuing years. [J.A. 100-13].

For over six years after his return home, no effort whatsoever was undertaken to determine Mr. Doggett's whereabouts. Neither a credit bureau nor driver's license check was ever undertaken during this time. [J.A. 38-39; Pet.App. 72]. Nor did the Government utilize a number of routine investigative techniques to locate an individual. [Pet.App. 72]. During this entire time, Mr. Doggett used his legal name and made no effort to conceal his identity or whereabouts. [Pet.App. 73].

But for the institution of a program called "WANT II," (Warrant Apprehension Narcotics Teams) [J.A. 91], it is clear the Government would have never arrested Mr.

Doggett. WANT II was a program began in September, 1988, by which the Marshal's Service determined whether warrants were outstanding and checked with the responsible law enforcement agency to determine if a given warrant had been or needed to be served. [J.A. 91,93]. Shortly after WANT II began in September, 1988, [J.A. 93], a search for Mr. Doggett was commenced, and within thirty minutes, the Government located and identified him through a credit bureau check. [J.A. 94-95]. According to Deputy Marshal Carr, who was in charge of the WANT II program, *"So as a routine,* when we started up the operation, we wanted to see what was available to us, *so we'd run the name automatically through* and get a credit check on them and see if there was any kind of activity on their credit." [J.A. 92] (emphasis added). The Government then quickly learned Mr. Doggett's driver's license number, the make and tag number of his vehicle, his wife's name, his employer, and his address. [J.A. 94-95].

Eight and one-half years after his indictment, Mr. Doggett was arrested on September 5, 1988. [J.A. 1,98; Pet.App. 1,65]. Mr. Doggett was arraigned on September 29, 1988, and the magistrate held a hearing on petitioner's Motion to Dismiss for violating his right to a speedy trial under the sixth amendment on December 14, 1988. [J.A. 12]. At that hearing, it was discovered that in the years between indictment and arrest, two events had happened that seriously interfered with any trial of this case. First, all of the seventeen tape-recorded conversations relevant to Mr. Doggett's prosecution had been lost. [J.A. 79]. Secondly, Ivan Cifuentes, a Government informant and a material witness to the events at issue, had

disappeared. [J.A. 78-79]. Although the case agent believed he would be able to locate the informant Mr. Cifuentes, he was, at the time of the hearing, "missing in action." [J.A. 78-79].

After the hearing on December 27, 1988, the magistrate entered a Report and Recommendation recommending that the motion to dismiss be denied. [Pet.App. 1, 59-60]. The petitioner filed timely Objections to the Magistrate's Report and Recommendation. [Pet.App. 62]. On January 31, 1989, the district court entered its order denying the petitioner's motion to dismiss for speedy trial violation, merely accepting the Magistrate's Report and Recommendation. [Pet.App. 62-63]. On February 3, 1989, the petitioner entered into a plea agreement reserving the right to appeal the dispositive issue of the speedy trial violation. [J.A. 114-17, Pet.App. 65]. At sentencing on March 31, 1989, the petitioner was adjudicated guilty of a felony and sentenced to three years of probation and a $1,000 fine. [J.A. 114-17].

On appeal, the Eleventh Circuit acknowledged that the Government had made no effort whatsoever to locate Mr. Doggett since 1985. [Pet.App. 71-72]. It further found:

> It is undisputed that from the time Doggett returned to the United States to the present, he has led a normal, productive, and law-abiding life. He met his wife in October 1982 and married a year later. Doggett interacted openly and freely in the community using his real name and making no attempt to conceal his identity or whereabouts. He financed two houses through the bank, possessed credit cards, was a registered voter, filed income tax returns, obtained a driver's license, was issued three traffic tickets,

> obtained his associate degree at college, and was employed as a computer operations manager.

[Pet.App. 73-74].

It then examined the four factors relevant to a speedy trial analysis: 1) length of the delay; 2) reason for the delay; 3) defendant's assertion of the right; and 4) prejudice to the defendant. It concluded that the Government's eight and one-half year delay between Mr. Doggett's indictment and arrest was "presumptively prejudicial" [Pet.App. 77] and that two of the other factors weighed " . . . against the government and none of the factors favor[ed] the government . . . " [Pet.App. 92].

Examining the fourth factor of prejudice, however, the court found that since the first three factors of the analysis did not "weigh heavily" against the Government, Mr. Doggett was required to establish "actual prejudice." [Pet.App. 90-91]. The Eleventh Circuit also employed a "clearly erroneous" test in examining the prejudice question, concluding that the lower court's finding of an insufficient showing of prejudice was not clearly erroneous and would be affirmed. [Pet.App. 97-98]. As a result, rather than independently examining and balancing the four factors as a whole, the court gave the prejudice factor controlling weight and, as to it, did not independently examine the degree of prejudice that had in fact been established.

In his dissent Judge Clark found that the Government's conduct in this case was "grossly negligent." [Pet.App. 102]. He criticized the majority's "mechanistic

approach" to what the majority opinion itself had conceded was " . . . a difficult and sensitive balancing process." [Pet.App. 100], *citing Barker v. Wingo*, 407 U.S. 574, 533 (1972). Examining the four relevant factors, Judge Clark concluded that the length of delay and reason for the delay should weigh *heavily* against the Government. [Pet.App. 101-02]. With respect to the reason for the delay, he concluded:

> As the majority concedes, the government's only justification for this inordinate delay is that it was not guilty of "bad faith or a dilatory purpose." At 578. According to the majority, the government was merely "negligent." The majority correctly recounts the government's 'attempts' to capture Doggett. It is evident on its face that the government did not capture Doggett because he was not worth the effort. He was a small fish in the ocean of those involved in the drug trade. Given that the government missed many opportunities to apprehend Doggett, I would consider its conduct in this case grossly negligent and would weigh this factor heavily against the government.

[Pet.App. 101-02] (footnote omitted).

As to the prejudice question, Judge Clark noted that the majority opinion failed to look at all the factors relevant to a speedy trial inquiry:

> There are other circumstances in this case which should be taken into account in determining Doggett's entitlement to relief. Because Doggett did not know he was indicted until he was arrested in 1988, he could not assert his right to a speedy trial earlier. In this case, Doggett has been leading "a normal, productive, and law-abiding life" since his return to the United States. At 577. It is reasonable to expect that

> after a certain point in time one will not have to answer for actions taken in the past. Generally, this protection is provided by the five-year statute of limitations in which "Congress has codified the policy that a person need not remain indefinitely in jeopardy for allegedly illegal acts." *See Mitchell*, 769 F.2d at 1547 (applying 18 U.S.C. § 3282). While the fact that the defendant does not learn about the charges until after the limitations period has expired does not automatically amount to a speedy trial violation, it is "another factor" that should be taken into account. *Id.* at 1547, 1548.

[Pet.App. 104-05]. Thus, balancing all factors relevant to the speedy trial inquiry "fairly and equitably," Judge Clark found the petitioner was entitled to the relief sought.

SUMMARY OF THE ARGUMENT

In determining whether a defendant should prevail on a speedy trial claim, this Court has looked to four interrelated factors: 1) length of delay; 2) reason for delay; 3) defendant's assertion of the right to a speedy trial; and 4) prejudice. This Court, however, has never required a defendant to make an affirmative showing of actual prejudice in order to prevail on such claim. *Moore v. Arizona*, 414 U.S. 25, 26 (1973); *Barker v. Wingo*, 407 U.S. 514, 533 (1972). In requiring the defendant to establish "actual prejudice," even where the remaining factors weigh in his favor, the court below did not engage in the balancing required by *Barker*. Instead, it gave the prejudice factor controlling weight over all other remaining

factors. Moreover, it examined only the prejudice to the defendant's ability to prepare a defense and did not consider other types of prejudice, recognized by this Court, which weighed in defendant's favor.

In addition, the court below did not properly allocate the burden of proof as to the prejudice question. Where, as here, the defendant did not waive his right to a speedy trial by knowingly avoiding arrest, the burden of proving no prejudice should rest with the Government, if a time period equal to the statute of limitations has run from the date of indictment to the date of arrest. Where the Government apprehends the accused within that period, the defendant would be required to establish actual prejudice. Where, however, there is the lack of diligence in apprehension, the Government should be required to prove the defendant was not prejudiced by the delay.

Had the correct analysis been applied to this case, the result would have been different. Balancing all four factors taken as a whole, it is clear that the balance weighs in favor of Mr. Doggett and that his Sixth Amendment right to a speedy trial was violated.

ARGUMENT

I.

WHEN THE FOUR FACTORS SET FORTH IN *BARKER v. WINGO*, ARE BALANCED AS A WHOLE, PETITIONER IS ENTITLED TO DISMISSAL OF THE CHARGES AGAINST HIM.

As the Eleventh Circuit found [Pet.App. 74], there can be no dispute in this case that the eight and one-half year delay between Mr. Doggett's indictment and arrest was solely caused by the Government's negligent approach to his apprehension. At virtually every step in the proceedings, the Government failed to comply with its diligent, good faith duty to bring an accused to trial within a reasonable amount of time. *Smith v. Hooey*, 393 U.S. 374, 383 (1969). It failed to employ ordinary and readily available sources of information to locate him. It failed to follow through on information known to it. It failed to utilize its own agencies which, at that time, were in regular contact with Mr. Doggett, to inform him of the charges against him and, on the occasion it had specific knowledge of his whereabouts, it ignored its duty to, at a minimum, place him on notice of the indictment. Even when it finally realized Mr. Doggett was no longer incarcerated in Panama, it took absolutely no steps to find him, although, as evidenced by his later arrest, such attempts would have located him within an hour. The result of these cumulative failures was to deprive Mr. Doggett of his constitutional right to a speedy trial.

In the seminal case of *Barker v. Wingo*, 407 U.S. 514 (1972), this Court set forth the framework by which to analyze whether an accused's constitutional right to a speedy trial has been violated. In *Barker*, the defendant

was indicted for murder in 1958. Due to a series of continuances requested by the State, which were not objected to by the defendant, he was not tried and convicted until over four years later. *Id.* at 516-517. On appeal, and later through habeas corpus proceedings, the defendant contended that he was denied his right to a speedy trial.

On review, this Court examined the speedy trial question and adopted a balancing test " . . . in which the conduct of both the prosecution and the defendant are weighed." *Id.* at 530 (footnote omitted). Finding that such a balancing test "necessarily compels courts to approach speedy trial claims on an ad hoc basis," this Court nonetheless set forth "some" of the factors to be utilized in determining whether a speedy trial violation has occurred: 1) length of delay; 2) reason for delay; 3) defendant's assertion of the right; and 4) prejudice. *Id.* at 530.

Significantly, however, the Court found no one factor to be " . . . either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." *Id.* at 533. Instead, the Court opined that these factors are related " . . . and must be considered together *with such other circumstances as may be relevant.*" *Id.* (emphasis added). This Court further cautioned:

> In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process. But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution.

Id. (footnote omitted).

The first factor – length of delay – was held to be a "triggering" mechanism. If the delay is of sufficient length, as it plainly is here, an inquiry into the other factors is warranted. *Id.* With respect to the reasons for the delay, although governmental negligence is to be "weighted less heavily" it should nonetheless be considered against the Government. *Id.* at 530. Where, as here, the delay is the result of gross negligence by the Government, this factor should be weighed more heavily than mere negligence or bureaucratic backlog.

With respect to assertion of the right, this Court found that the defendant in *Barker* had been given the opportunity to object to the numerous continuances in his case, but had failed to do so. Indeed, the Court stated, "[m]ore important than the absence of serious prejudice is the fact that Barker did not want a speedy trial." *Id.* at 534. In concurring with the majority, Justice White emphasized this point when he stated, "[I]t is apparent that had Barker not *so clearly* acquiesced in the major delays involved in this case, the result would have been otherwise." *Id.* at 537 (emphasis added). Thus, this Court has clearly distinguished between instances, where the defendant *knowingly* acquiesces to the Government's delay, from those instances where no such waiver is apparent from the record. In the present case, there is absolutely no evidence that Mr. Doggett in any way waived his right to a speedy trial or knowingly acquiesced in the Government's delay.

The Court found that the final factor of prejudice should be analyzed, " . . . in light of the interests of defendants which the speedy trial was designed to protect." *Id.* at 532. Three such interests are: 1) prevention of

oppressive pretrial incarceration; 2) minimization of "anxiety and concern" of the accused; and 3) limitation of the possibility that the defense will be impaired. *Id.*

With respect to the second factor of the prejudice analysis, this Court has acknowledged the destructive effect lengthy pre-trial delays can have on an individual. *Barker*, 407 U.S. at 520-521. Indeed, in his dissent below, Judge Clark noted the total disruption to Mr. Doggett's "normal, productive and law-abiding life" caused by his belated arrest. *Id.* at 583. In this case, a young adult, not knowing he was in trouble with the law, rehabilitated himself without help from society and became a productive citizen, only to find himself arrested years later on a cocaine charge. This arrest was a total and complete disruption of Mr. Doggett's life and resulted in mental anguish no less traumatizing and, perhaps, more traumatizing than had he been arrested in 1980. Thus, if prejudice is to be evaluated not only in terms of trial prejudice, but also in terms of prejudice to one's life, sufficient prejudice has been established in this case.

In *Moore v. Arizona*, 414 U.S. 25 (1973), this Court again addressed the prejudice prong of the speedy trial analysis. In that case, the defendant was not tried for murder until three years after he was charged and twenty-eight months after he first demanded a speedy trial. Prior to trial, he filed a state habeas application, which was denied, the Arizona Supreme Court, specifically finding that the defendant had failed to establish prejudice.

On review, this Court in a *per curiam* opinion reversed and held that a showing of prejudice is not essential to establish a speedy trial violation. In doing so, the court re-affirmed the use of "a difficult and sensitive" balancing test, considering all four factors taken as a whole. *Id.* at 26. It then observed:

> The state court was in fundamental error in its reading of *Barker v. Wingo* and in the standard applied in judging petitioner's speedy trial claim. *Barker v. Wingo* expressly rejected the notion that an affirmative demonstration of prejudice was necessary to prove a denial of the constitutional right to a speedy trial . . .

Id.

While confirming that no one factor is necessary or sufficient to prevail on a speedy trial claim, this Court also noted, "[P]rejudice to a defendant caused by delay in bringing him to trial is not confined to the possible prejudice to his defense in those proceedings." *Id.* at 26-27 (footnote omitted). *Moore* thus clearly suggests that a wide variety of effects upon an accused's life may be considered within the prejudice analysis.

Previously, in *United States v. Marion*, 404 U.S. 307 (1971), this Court had examined the prejudice question within the context of pre-indictment delay. The Court declined to dismiss an indictment where the defendants were indicted within the applicable statute of limitations and arrested shortly thereafter. Concluding that speedy trial guarantees do not become applicable until an individual has, in some fashion, been accused, this Court found the statute of limitations sufficient to prevent stale prosecutions. Within that framework, the Court discussed

the many ways in which an individual may be prejudiced by delay:

> Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. . . . Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Id. at 320. *See also Klopfer v. North Carolina*, 386 U.S. 213, 222 (1967).

It is precisely this type of prejudice, referred to by Judge Clark in his dissenting opinion below, that is present in this case. As noted by Judge Clark, "The defendant cannot always show all of the prejudice he faces when the government waits over eight years to bring him to trial." [Pet.App. 103]. Moreover, Mr. Doggett demonstrated the loss of seventeen tape recordings, which could well have established a valid defense, and further established that a material witness had disappeared. [J.A. 79]. Thus, Mr. Doggett's delayed arrest completely disrupted his life, drained his financial resources, interfered with his liberty and may well have actually interfered with his ability to present a defense.

In its analysis, the Eleventh Circuit not only overlooked this perhaps more intangible prejudice, and down

played the possibility of prejudice at trial, it also skewed the balancing test, giving the prejudice factor, as it interpreted it, more weight than the other three factors combined. [Pet.App. 98]. Although this approach was consistent with the Eleventh Circuit's earlier opinion of *United States v. Mitchell*, 769 F.2d 1544 (11th Cir. 1985);[5] it was entirely inconsistent with the opinions of this Court.

While no one factor should be given greater weight than the other three combined, under the facts of this case Mr. Doggett established sufficient prejudice to make this factor favorable to him and, if not, at least neutral in the balancing analysis. The Eleventh Circuit did not properly balance the factors at issue. Had it done so, it would have reversed Mr. Doggett's conviction due to the Government's failure to give him a speedy trial.

II.

WHERE, AS IN THIS CASE, THE TIME EQUAL TO THE STATUTE OF LIMITATIONS HAS RUN FROM INDICTMENT TO ARREST AND THE DEFENDANT DOES NOT KNOWINGLY AVOID ARREST FOR THE OFFENSE, OR OTHERWISE WAIVE HIS RIGHT TO A SPEEDY TRIAL, THE DEFENDANT SHOULD NOT BE REQUIRED TO ESTABLISH ACTUAL PREJUDICE TO PREVAIL ON A SPEEDY TRIAL CLAIM.

In many of its cases addressing speedy trial claims, one of the factors this Court has examined is whether the

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[5] *See also Ringstaff v. Howard*, 885 F.2d 1542, 1545 (11th Cir. 1989) (en banc) ("[T]he three *Barker* factors must weigh *heavily* against the Government before prejudice should be presumed.") (emphasis in original).

defendant has, by his own conduct, knowingly waived his right to a speedy trial. *See e.g., Barker v. Wingo*, 407 U.S. at 528-530. A defendant can waive such right in two ways. First, he can acquiesce to repeated continuances of his trial. *Id.* at 534. Second, he can knowingly avoid arrest on the charges against him. *See e.g., Rayborn v. Scully*, 858 F.2d 84, 92 (2d Cir. 1988). In both such instances, the accused has knowingly given up a right available to him. *Barker*, at 529 ("We hardly need add that if the delay is attributable to the defendant, then his waiver may be given effect under the standard waiver doctrine . . . "); *Scully*, at 92 ("In this case, Rayborn's status as a bail jumper, absconder and fugitive weighs heavily against him in our analysis of his speedy trial claim.").[6]

Where the accused is unaware of the indictment pending against him, however, it cannot be said that he has knowingly waived his right to a speedy trial. Thus, a critical factor in the speedy trial analysis should be whether the accused knowingly attempted to avoid arrest or in some fashion agreed to the Government's delay. The rationale for this waiver rule is straightforward. Where the defendant is ignorant of the charges against him, he does not have the ability to assert his speedy trial right. Green, *"Hare and Hounds": The Fugitive Defendant's Constitutional Right to Be Pursued*, 56 Brooklyn L.Rev. 439, 460 (Spring, 1990). Where, as here, however, the Government easily could have notified the accused of such right, it should not be heard to complain that he failed to assert it.

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[6] In *Scully, supra*, 858 F.2d at 92, the court also noted that the defendant failed to seek a speedy trial until " . . . well over three years after he was informed of the subject charge."

If there has been no such waiver, this Court should adopt a "bright-line" approach to the prejudice question. Where the defendant lacks knowledge of the indictment and the statute of limitations[7] has expired from the date of indictment to the date of arrest, actual prejudice should be presumed. The Government should then be permitted to prove that the defendant has not been prejudiced by its delay. This time frame, which would have given the Government five years *from the indictment* in this case, is very generous to the Government, can be easily ascertained by all concerned, and follows a closely analogous time frame established by Congress.

This approach is also consistent with the approach employed by this Court in *United States v. Marion*, *supra*, 404 U.S. at 320-322. In *Marion*, the Court held that where the statute of limitations has not run for the offense charged, a period of three years between acts committed and indictment does not violate the sixth amendment. With respect to such limiting statutes, the Court stated, "These statutes provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." *Id.* at 322 (footnote omitted).

Similarly, in *Toussie v. United States*, 397 U.S. 112, 114-115 (1970)[8] this Court noted that one of the purposes

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[7] Under the terms of 18 U.S.C. § 3282, the statute of limitations for the offenses charged against the defendant is five years.

[8] In *Toussie*, *supra*, this Court upheld the defendant's challenge to his conviction for failure to register for the draft where the Government waited eight years to prosecute him for that offense.

of the statute of limitations is " . . . to minimize the danger of official punishment because of acts in the far-distant past." This rationale is fully applicable where a defendant lacks knowledge of an indictment for an extended period of time, for it is after such extended time that the defendant is prejudiced in ways other than impairment of his defense at trial.

Where a defendant lacks knowledge of an indictment, the statute of limitations serves as a way to ensure that the Government meets its burden of bringing an individual to trial within a reasonable time. Once the period has expired from indictment to arrest without the individual being informed of a pending indictment, the burden should then rest with the Government to establish there was no prejudice to the defendant. If the Government meets this burden, it would remain free to continue its prosecution. If it cannot, dismissal of the charges against the defendant would be mandated.

This proposed standard for a defendant who is without knowledge of a pending indictment is consistent with the approach taken in *Smith v. Hooey*, 393 U.S. at 383, where this Court held that, upon demand, the Government has a "diligent, good faith" duty to bring an accused to trial. Application of such a standard would impose no undue burden upon the Government. Merely notifying the defendant that charges are pending against him would discharge the Government's initial duty. Establishing that a defendant knew of the charges against him and failed to assert his right to a speedy trial would also weigh heavily against him in the balancing process and, in most instances, would defeat his claim. *Barker*, 407 U.S. at 529. Only in those instances, where the defendant

did not have knowledge of a pending indictment, would a reviewing court be required to examine whether the statute of limitations had expired from indictment to arrest. Even then, a defendant's right to speedy trial discharge could be defeated where the Government can show that the remaining factors in the speedy trial analysis weigh in its favor.

The factor of prejudice would remain part of the Court's consideration. Where the accused could establish one of the three types of prejudice discussed in *Barker*, that factor would weigh in his favor. Under this test, however, prejudice would not be the controlling factor in determining whether the right to speedy trial has been violated. Rather, it would be one of the facts to be considered. This type of balancing process is precisely the type contemplated in *Barker* and provides a method of consistent application of that decision.

In the present case, the Government had both the ability and opportunity to notify Mr. Doggett of the indictment pending against him. The State Department was in-contact with both Mr. Doggett and his family, and was in communication with the DEA, during Mr. Doggett's incarceration in Panama. [J.A. 62-64]. It would have been a simple task for one of the two governmental agencies to notify Mr. Doggett of the indictment pending against him. Such notification would have discharged the Government's duty of due diligence. Since it made no effort to notify Mr. Doggett of the indictment pending against him for over eight years, he should not have been required to establish that his defense at trial was actually prejudiced by the government's delay.

Alternatively, this Court could adopt the analysis recently set forth by the New Mexico Supreme Court in *Zurla v. State*, 789 P.2d 588 (N.M. 1990). In that case, the court was called upon to determine whether a nineteen month delay between arrest and trial for the offense of shoplifting violated the defendant's right to a speedy trial. Concluding that it did, the court held that the extent to which the Government's delay is to be weighed is increased by the length of time during which no attempt is made to locate the accused. *Id.* at 591. The longer the Government fails to take reasonably diligent efforts to locate an accused, the more its inaction should be weighed against it. Under this standard:

> Once the defendant has demonstrated presumptively prejudicial delay and thus triggered the *Barker v. Wingo* analysis, the presumption of prejudice does not disappear. Rather, the burden of persuasion rests with the state to demonstrate that, on balance the defendant's speedy trial right was not violated.

Id. at 594.

Under either standard Mr. Doggett is entitled to relief. Over eight years lapsed between Mr. Doggett's indictment and arrest. During those years, the Government failed to exercise its duty of due diligence to locate Mr. Doggett and notify him of the indictment pending against him.

Since Mr. Doggett never knowingly waived his right to a speedy trial and since the factors set forth in *Barker v. Wingo*, 407 U.S. at 514, taken as a whole, weigh in his

favor, dismissal of the indictment against Mr. Doggett was required under *Barker*.

CONCLUSION

Mr. Doggett was denied his Sixth Amendment right to a speedy trial. Contrary to the dictates of this Court, the Eleventh Circuit concluded that the prejudice factor was dispositive over the other factors of the speedy trial analysis. It committed additional error when it held that Mr. Doggett had not established sufficient "actual prejudice," without examining other aspects of defendant's proof concerning prejudice. For these reasons, this Court should reverse the conviction imposed against Mr. Doggett in this cause.

Respectfully submitted,

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